



1700 G Street NW, Washington, D.C. 20552

VIA Electronic Mail

June 4, 2019

Mr. Taylor Scott Amarel
MuckRock News
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Re: Final Appellate Determination Denying FOIA Appeal No. 2019-282

Dear Mr. Amarel:

This letter constitutes the final determination of the Consumer Financial Protection Bureau regarding your appeal of the Bureau's response to Freedom of Information Act (FOIA) Request CFPB-2019-282-F (the Request).¹ For the reasons set forth below, the appeal is denied.

I. Background

On April 2, 2019, the Bureau received the Request seeking:

¹ The Bureau's FOIA regulations are codified at 12 C.F.R. §§ 1070.10 *et seq.* Pursuant to these regulations, the authority to determine FOIA appeals rests with the Bureau's General Counsel or her delegate. See 12 C.F.R. § 1070.21(e). The General Counsel has delegated to me the authority to determine the appeal of the Bureau's response to the Request. This letter therefore constitutes the Bureau's final response to the Request.

[A]ll emails sent to, from or copied to CFPB-
WHISTLEBLOWER@cfpb.gov, containing the following non-case-sensitive keystring in the content or headers of the emails,
“anthonyjim85@gmail.com”.

Please search from January 1, 2014 to January 1, 2018.

On May 2, 2019, the Bureau transmitted its response to the Request (the Response). First the Response provides that pursuant to FOIA Exemptions 7(A) and 7(E) the Bureau can neither confirm nor deny the existence of records responsive to the Request. Next the Response explains that pursuant to Exemption 7(A)’s protection for material relevant to an ongoing enforcement proceeding, the Bureau is withholding all records responsive to the Request. The Response further provides that “once all pending matters are resolved and FOIA Exemption 7(A) is no longer applicable, there may be other exemptions which could protect certain information from disclosure, such as FOIA exemptions 7(C), 7(D), 7(E), and/or 8.”

On August 14, 2017, you filed this appeal challenging the failure to produce responsive records because the “[s]ubject matter of the requested documents exists and it is not believed that all of the records should be withheld. Redacted emails with dates, headers, and other information could be released.” The appeal further asserts that “at a minimum,” the Bureau should provide “the number of records and pages that match the description and are being withheld.”

II. Appellate Determination

At the outset, it is necessary to clarify a misstatement in the Response to the Request. The Request sought emails that were “sent to, from, or copied to” the Bureau’s whistleblower mailbox and that contained the email address anthonyjim85@gmail.com in either the content or the header. The Response provides both that the Bureau’s FOIA Office could neither confirm nor deny the existence of the requested emails and that the FOIA Office was withholding responsive emails pursuant Exemption 7. Because the available record on the processing of the Request shows the FOIA Office did not conduct a search of the whistleblower mailbox for responsive emails, the Response could not have confirmed or denied the existence of the requested emails and any suggestion that responsive emails were identified and withheld was a misstatement.

The Request sought information provided to the Bureau’s electronic mailbox for whistleblower communications. CFPB Bulletin 2011-05 provides guidance to the public on the Bureau’s whistleblower program. The Bulletin solicits information from sources with knowledge about potential violations of federal consumer financial laws. It welcomes whistleblower information and other law enforcement tips “from current or former employees of potential violators, contractors, vendors, and competitor companies.” The Bulletin further recognizes the need of some whistleblowers to provide their information anonymously and

allows for the anonymous transmission of information by email to whistleblower@cfpb.gov. And the Bulletin assures those who make anonymous submissions that “[t]o the extent consistent with law enforcement needs the Bureau will not disclose your identifying information and will maintain your confidentiality as permitted by federal laws such as the Privacy Act, the Freedom of Information Act and any applicable Bureau regulation.” See CFPB Bulletin 2011-05 (Enforcement and Fair Lending), Dec. 15, 2011, available at https://files.consumerfinance.gov/f/2011/12/CFPB_Enforcement_Bulletin_12-15-11.pdf.

Your appeal challenges the Bureau’s reliance on Exemption 7 to withhold all responsive records. Exemption 7(C) allows an agency to withhold material that was compiled for law enforcement purposes when disclosure of that material “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C). Applying Exemption 7(C), the Supreme Court found that a third-party’s request for law enforcement records pertaining to a private citizen categorically invades that citizen’s privacy. *See DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 777 (1989). And where the third-party’s request seeks no official information about the federal agency, the privacy invasion is unwarranted. *Id.*

Under this framework, Exemption 7(C) applies to protect from disclosure the emails that you requested. The threshold requirement of Exemption 7(C) is met because the requested emails are law enforcement records that were compiled for law enforcement purposes. *See Rural Housing Authority Alliance v. U.S. Dept. of Agriculture*, 498 F.2d. 73, 80-83 (D.C. Cir. 1974). Next, because you requested law enforcement records pertaining to the individual associated with email address anthonyjim85@gmail.com, your Request was an invasion of the email address owner’s privacy. Exemption 7(C) applies to protect the identity of individuals who provide information to a law enforcement agency about potential violations of law. *McCutchen v. U.S. Dept. of Health and Human Svs.*, 30 F.3d 183, 189 (D.C. Cir. 1994) (“complainants have a strong privacy interest in remaining anonymous because, as ‘whistle-blowers,’ they might face retaliation if their identities were revealed”). And, where Exemption 7(C) applies to protect an individual’s identity from disclosure, all personally identifiable information about the individual may be withheld. *See Nat’l Whistleblower Ctr. v. U.S. Dept. of Health and Human Svs.*, 849 F. Supp. 2d 13, 30 (D.D.C. 2012); *Sorin v. U.S. Dept. of Justice*, 280 F. Supp. 3d 550, 564 (D.D.C. 2017). Finally, because your Request did not seek information about the operation of the Bureau, disclosure of the requested emails is an unwarranted invasion of the whistleblower’s privacy.

In addition, the Bureau’s Response to your Request appropriately refused to confirm or deny the existence of emails from the individual associated with email address anthonyjim85@gmail.com. FOIA’s “exemptions cover not only the content of protected records but also the fact of their existence or nonexistence, if that fact itself properly falls within the exemption.” *Larson v. Dep’t of State*, 565 F.3d 857, 861 (D.C. Cir. 2009). An agency may, therefore, “refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under a [] FOIA exception.” *Wolf v. CIA*, 473 F.3d 370, 374 (D.C.

Cir. 2007) (internal quotation marks and citation omitted). In other words, such a response is appropriate where an agency's confirmation of the existence of a record would cause the very harm that a specific exemption is intended to prevent. If the Bureau were to deny the existence of law enforcement records pertaining to a particular person when it could do so, then that would indicate that a response like this one – that the Bureau can neither confirm nor deny the existence of responsive records – was in fact a statement that records pertaining to the person do exist. This “Glomar” response is, accordingly, appropriate.

Because disclosure of the existence of the requested emails would have confirmed that the individual associated with the email address anthonyjim85@gmail.com transmitted information to the Bureau’s whistleblower mailbox, the Bureau appropriately refuse to confirm or deny the existence such emails. Because the Bureau appropriately withheld the requested email based on Exemption 7(C), it is not necessary to reach the applicability of Exemption 6, 7(A), 7(D), 7(E), or 8.

For the foregoing reasons, the appeal is denied.

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If you are dissatisfied with the Bureau’s final appellate determination, you may contact the Office of Government Information Services (OGIS), which offers mediation services to resolve disputes between FOIA requesters and Federal agencies pursuant to 5 U.S.C. § 552(h)(3). Using OGIS services does not affect your right to pursue litigation. Under 5 U.S.C. § 552(a)(4)(B), you may also seek judicial review of this appeal denial in the U.S. District Court where you reside, in the district where the documents are located, or in the District of Columbia.

Digitally signed by
Steven Y. Bressler
Date: 2019.06.04
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Steven Y. Bressler
Assistant General Counsel for
Litigation and Oversight